

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NORA VARGAS, on behalf of herself and
others similarly situated,

Plaintiff,

vs.

3:23-CV-02689-B

PANINI AMERICA, INC.,

Defendant.

SHOW CAUSE HEARING
BEFORE THE HONORABLE JANE J. BOYLE
UNITED STATES DISTRICT JUDGE
AUGUST 28, 2024

A P P E A R A N C E S

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1 (In open court at 10:28 a.m.)

2 THE COURT: This is Case Number
3 3:23-CV-2689-B, Nora Vargas versus Panini America,
4 Inc.

5 We are here this morning for an unusual
6 hearing, because of the allegations of the AI brief.
7 We'll get into that in a minute. But I would like
8 to have each side introduce themselves, state who
9 they are and who they represent, and I will start
10 with counsel for the Plaintiff.

11 MR. NESBITT: Earl Nesbitt with Rogge Dunn
12 Group representing the plaintiff.

13 THE COURT: Okay.

14 MR. ZAREH: Good morning, Your Honor.
15 Omid Zareh with Weinberg, Zareh, Malkin, Price, also
16 for the plaintiff.

17 MR. WEBSTER: Lane Webster with the Rogge
18 Dunn Group, as well on behalf of the plaintiff.

19 THE COURT: Okay. Anybody else?

20 MR. FANT: John Fant with Weinberg, Zareh,
21 Malkin, Price --

22 THE COURT: I'm sorry, I can't hear you.

23 MR. FANT: John Fant with Weinberg, Zareh,
24 Malkin, Price.

25 THE COURT: All right. Is everybody here

1 with Rogge Dunn?

2 MR. PENNETTI: Alex Pennetti.

3 THE COURT: Okay. Tell me who you're
4 with.

5 MR. PENNETTI: I'm with Thompson Coburn.

6 THE COURT: Wait, no. You right here.

7 MR. PHAM: William Pham.

8 THE COURT: Mr. Nesbitt.

9 MR. NESBITT: Yeah, I'm sorry, Rogge Dunn
10 Group.

11 THE COURT: Okay. And you are Mr. Zareh.
12 And you are with?

13 MR. ZAREH: Weinberg Zareh.

14 THE COURT: And I know you are with Rogge
15 Dunn and -- go ahead.

16 MR. PHAM: William Pham, Weinberg Zareh --

17 THE COURT: Okay.

18 MR. PHAM: -- for the plaintiff.

19 MR. PENNETTI: Alex Pennetti, Your Honor.
20 I was formerly with Rogge Dunn Group.

21 THE COURT: Yes. Thank you.

22 MR. FANT: John Fant, Weinberg Zareh.

23 THE COURT: Thank you very much.

24 And for the defense?

25 MS. DE SANTOS: Good morning, Your Honor,

1 Laura De Santos on before of Panini America. I'm
2 with Gordon & Rees, Scully, Mansukhani.

3 THE COURT: Okay. You're with Gordon &
4 Rees?

5 MS. DE SANTOS: Scully Mansukhani.

6 MS. MITCHELL: Good morning, Your Honor.
7 Megan Mitchell, also with Gordon & Rees Scully
8 Mansukhani.

9 THE COURT: Okay.

10 MR. ROBERTS: Good morning, Your Honor.
11 Seth Roberts with Locke Lord here in Dallas
12 representing Panini America.

13 THE COURT: Okay. And the other firm is
14 out of town? The firm -- they're not from Dallas,
15 they are from out of town?

16 MS. DE SANTOS: Correct, well, Houston and
17 Dallas.

18 THE COURT: Okay. Thank you.
19 Go ahead.

20 MR. GREGORY: David Gregory with
21 Locke Lord, from the Houston office of Locke Lord.

22 THE COURT: Okay. Thank you-all very
23 much.

24 Okay. This is a defense motion. And I
25 have read all through the motion a couple of times

1 and read all the cases and read the cases that were
2 cited by the plaintiffs.

3 So let's begin by having the defense come
4 up here and give me their best case. Come on up.

5 Who is going to speak for the defense?

6 MS. DE SANTOS: I'm happy to, Your Honor.

7 THE COURT: Come on up here.

8 MS. DE SANTOS: And by "here," I hope you
9 mean here.

10 THE COURT: Right there, yes.

11 MS. DE SANTOS: I really will actually
12 just keep my comments brief, Your Honor. Because I
13 think the Court has identified in its show cause
14 order and in Document Number 36 that was issued just
15 last week, the -- has put its finger on the issues
16 that have caused a bit of confusion, certainly on
17 the defense side and for the Court.

18 The plaintiff's response to the motion to
19 dismiss contained, as the Court is well aware, a
20 number of cases that were represented to address and
21 rebut specific legal arguments that were made with
22 regards to the individual claims that Ms. Vargas
23 brings and the class representative claims that she
24 brings.

25 Often those claims or the representations

1 that were made and the cases that were cited --

2 THE COURT: Slow down. Slow down. The
3 cases that were cited.

4 MS. DE SANTOS: The cases that were cited
5 does not stand for the proposition, in fact, that
6 they were representative.

7 THE COURT: Go ahead.

8 MS. DE SANTOS: In addition, there were
9 cases cited that were, in fact, legitimate cases
10 containing, perhaps, citation errors, but legitimate
11 cases that did not hold for the proposition for
12 which they were represented.

13 As a result, the defendants filed a reply
14 brief identifying each of these issues. There
15 was -- and in our reply brief, of course, we contend
16 and surmise that the briefing appears to have --

17 THE COURT: AI.

18 MS. DE SANTOS: -- AI, yeah. I'm
19 struggling with another explanation for it.

20 To suggest that two law firms with
21 competent lawyers worked together to file this brief
22 did not make it better but, in fact, made it worse.

23 THE COURT: How do you mean made it worse?
24 How did they make it worse?

25 MS. DE SANTOS: My understanding from the

1 plaintiff's response is that the errors that are
2 identified were a result of merging work product.

3 THE COURT: Yeah, and then -- I was
4 thinking you were saying when they filed the
5 response to the show cause order.

6 MS. DE SANTOS: All right. So I was
7 addressing the initial response, Your Honor.

8 Nonetheless, I think the show cause order
9 requested very specific information, most notably --
10 or at least what I picked up on, Your Honor -- is
11 the Court's request for information as to how -- how
12 those cases got into the brief to begin with.

13 I don't believe that has been fully
14 explained. We have identified in both our reply
15 brief and in our response -- or response to the
16 plaintiff's response to the show cause order that
17 there are still issues that haven't been fully
18 addressed.

19 For example, how did the *Bradshaw*, the
20 *Mims*, the *Dobbins*, the *Johnson v. Pride* case, how
21 did those cases get into the brief? And how did the
22 representation come to be that they held for a
23 specific proposition that conveniently rebutted a
24 specific legal issue that we raised with regards to
25 our opening motion to dismiss?

1 THE COURT: But they didn't.

2 MS. DE SANTOS: They didn't. And although
3 there has been an abundance of *mea culpa* associated
4 with the briefing, there hasn't been the underlying
5 explanation as to how that happened.

6 I believe that's really, I think, one of
7 the central issues of why we are here and why we
8 believe the show cause issue has not been fully
9 addressed for the Court and for the parties in the
10 case.

11 THE COURT: Okay.

12 MS. DE SANTOS: We are not seeking -- and
13 in case there is any specific doubt, we are not
14 seeking any attorney's fees. We are not seeking any
15 sanctions in the form of attorney's fees to the
16 defendants. We will leave it to the Court to make
17 whatever remedial action it feels is appropriate
18 under the circumstances. We are not seeking that
19 here.

20 I think -- I got up here and said I was
21 going to be brief, and I'm not being brief.

22 THE COURT: No, no, take your time. I
23 want to hear all of this.

24 MS. DE SANTOS: I think the Court has --
25 we have filed in our response to the plaintiff's

1 filing, Document Number 43.

2 THE COURT: Yeah, I've got it.

3 MS. DE SANTOS: I think I've addressed the
4 fact that we're still struggling to understand how
5 those got into the brief. It doesn't make sense
6 that the merging of work product from two different
7 firms resulted in a misrepresentation of what those
8 cases held.

9 I certainly, I'm sure, in -- in editing
10 briefs, have made typos, meant to cite F.Supp. and
11 accidentally cited F.2d. Certainly that's a very
12 common error. And I'm certainly not going to
13 suggest that this is just a typo. These are more
14 than just typos. These are more than, We just cited
15 the wrong volume or page number or had poor Blue
16 Book citation.

17 These are fundamental representations to
18 the Court rebutting specific legal arguments that
19 are, in fact, either untrue or misstated, grossly
20 misstated in some instances, and just plain false.
21 And it's hard for us to see how those don't arise
22 outside of the AI context.

23 I think I have also addressed the fact
24 that the Court's show cause order specifically
25 requested that explanation. That has not been

1 provided.

2 The third issue I want to raise is that
3 the plaintiffs, in their response to the Court's
4 request on the show cause order, almost doubles down
5 on the response to the motion to dismiss and
6 continues to take the position that their legal
7 positions are warranted, when a review of their
8 briefing suggests that that's, I think, a further
9 representation that I think lacks good faith in
10 suggesting that their response to the motion to
11 dismiss ought to win them the day and that the
12 motion to dismiss ought to be denied.

13 In fact, a careful look at those, the
14 deficiencies and those cases that do not, in fact,
15 hold what they represent, leaves them without
16 response at all to our motion to dismiss in a lot of
17 instances.

18 In fact, I would argue the class claims
19 can be dismissed because they have not presented any
20 real authority to rebut those allegations. And the
21 individual claims for hostile work environment,
22 wrongful discharge and retaliation similarly lack,
23 frankly, any response that is legitimate.

24 And I think the plaintiff's arguments,
25 further, with regards to both *Allison* and the

1 *Deepwater Horizon* case, as represented, don't fully
2 address what the Court's holdings have been in that
3 case. And because of that, just to circle back to
4 those class claims, those, too, should fail.

5 So my -- I think my final point here, Your
6 Honor, is, I don't think the plaintiffs have come
7 forward with sufficient information to rebut the
8 motion to dismiss. The motion to dismiss should be
9 granted.

10 And in response to the Court's request
11 that they explain how those misrepresentations got
12 into the record, got into their brief, has not been
13 sufficient. And for that reason, I think they have
14 failed to meet the Court's -- the Court's request to
15 show cause.

16 THE COURT: Well, thank you very much,
17 Ms. De Santos. Do you have anything else to say?

18 Okay. Who is going to speak for the
19 defense?

20 MR. NESBITT: Your Honor, I'm going to
21 start off, but also Mr. Zareh would like to address
22 the Court.

23 THE COURT: Where is Mr. Dunn, Rogge Dunn?

24 MR. NESBITT: He's out of the country,
25 Your Honor.

1 THE COURT: Okay.

2 MR. NESBITT: He did not work on the brief
3 at all.

4 THE COURT: Okay. Okay. All right.

5 Mr. Pham, then, go ahead, come on up.

6 MR. NESBITT: Mr. Nesbitt.

7 THE COURT: I'm sorry, Mr. Nesbitt. Yes,
8 yes.

9 But let me say first, just be very careful
10 about what you say here. Because, you know, to me
11 it's very clear this is an AI brief. I will hear
12 from you, and maybe I will change my mind. But I
13 just want to make sure that you don't get up there
14 and double down on something that is just not true.
15 Just fall on your sword, please tell me the truth.
16 But I'm going to have a hard time finding this is
17 not an AI brief.

18 Go ahead.

19 MR. NESBITT: Understand, Your Honor. I'm
20 going to go ahead and start off and say that -- and
21 I think Mr. Zareh will address it from the
22 standpoint of what I am going to call our New York
23 co-counsel -- this was not an AI brief from Rogge
24 Dunn Group. We've been assured by co-counsel it was
25 not an AI brief from them.

1 THE COURT: Well, you know, did you-all
2 work on it?

3 MR. NESBITT: Did Rogge Dunn work on it?

4 THE COURT: No, did Rogge Dunn work on it?

5 MR. NESBITT: Rogge Dunn Group attorneys,
6 myself and Mr. Webster, yes, we worked on it.

7 THE COURT: Are you the main ones that
8 worked on it?

9 MR. NESBITT: I would not say we were the
10 main ones. The original product came from our
11 co-counsel in New York. And then we worked to
12 revise it and --

13 THE COURT: Okay. Well --

14 MR. NESBITT: But what I can say
15 unequivocally is that -- and I think Mr. Webster
16 will -- if he needs to, will address the Court, is I
17 wouldn't know how to use AI in a brief, to be
18 honest, and I did not use AI on this brief.

19 THE COURT: Well, somebody did, because
20 it -- it just -- it would be too hard to make these
21 mistakes so consistently through the brief that --
22 on your own just make those stupid mistakes, because
23 it's not even lawyering. It's just bad, bad
24 briefing.

25 And so I say that because I think one or

1 two mistakes like that would be fine, but all the
2 way through, and it's just consistent. And I think
3 it would be so much harder to make a brief like that
4 rather than a good brief to get that right. I mean,
5 all those wrong cites to put that down in writing
6 and make that your presentation.

7 MR. NESBITT: I can agree with the Court
8 on a couple of things. Number one is that it's a
9 bad brief. And number two, it has wrong case
10 citations.

11 I can also agree that it was -- it would
12 be -- it would seem to be and appear to be a lot
13 more difficult to prepare this bad brief rather than
14 a good brief. I agree with you.

15 THE COURT: Yes, exactly.

16 MR. NESBITT: But I can assure you that
17 that was not the intention. And I can only speak
18 for myself and the people that worked on it at our
19 firm, and I believe Mr. Zareh will address it from
20 his.

21 THE COURT: Did Mr. Webster primarily work
22 on it or who?

23 MR. NESBITT: I would say it was me and
24 Mr. Webster together.

25 THE COURT: Okay.

1 MR. NESBITT: And neither one of us used
2 AI. And he can certainly address that with the
3 Court.

4 With respect to the miscites and
5 procedurally -- and I think I need to address
6 that -- is the Court indicated that we were here on
7 defendant's motion. And as counsel has suggested,
8 they don't have a motion.

9 THE COURT: I know.

10 MR. NESBITT: We are here to address the
11 order to show cause, and we felt like we addressed
12 the order to show cause in the reply brief.

13 THE COURT: But you didn't, because even
14 when you did, you cited to a case that didn't stand
15 for that proposition. I'm trying to find it, where
16 I found it, but -- just a minute.

17 MR. NESBITT: Sure.

18 THE COURT: I can't find it right now --
19 oh, yeah, yeah, response to the OSC contained -- I
20 don't have it right here. Yeah.

21 MR. NESBITT: Well, I can --

22 THE COURT: Anyway, there's a miscited
23 case in the response to the OSC.

24 MR. NESBITT: I -- I've looked at all of
25 those cases before and last night, and from our

1 perspective, the response that they filed was --
2 falls into -- with respect to their criticism of the
3 case --

4 THE COURT: Their response or your
5 response?

6 MR. NESBITT: Sorry. Their response to
7 our response. And that was a little confusing,
8 because we were responding to the order to show
9 cause. I'm not sure what they were responding to.

10 THE COURT: Well, they were putting their
11 two cents in, which they are entitled to.

12 MR. NESBITT: Exactly.

13 Their criticism of our response to the
14 order to show cause relative to the specific cases
15 falls into two categories. And one was that we
16 didn't go far enough in explaining it. And for
17 instance, in the *Allison* case, they -- we did cite
18 it for the proposition that the 5th Circuit had
19 recognized that individual monetary relief can be --

20 THE COURT: Slow down. Slow down. Go
21 ahead.

22 MR. NESBITT: Sorry.

23 THE COURT: Go ahead.

24 MR. NESBITT: Sorry -- recognized that
25 individual monetary relief can be sought within the

1 framework of a class action provided it does not
2 predominate over the common issues of fact. That is
3 in that case, and it says that exactly.

4 Their criticism was that we did not set
5 forth that in *Allison* the Court did not find that
6 the individuals predominated.

7 But, in fact, in our *mea culpa* letter, we
8 acknowledged that very fact.

9 THE COURT: That's fine. So you did that.
10 What about *Mims*? What about these other cases,
11 where they had absolutely nothing to do with --
12 either the case cite was wrong or it cited a
13 proposition that didn't exist for that case?

14 MR. NESBITT: That was the cases that we
15 addressed in the *mea culpa* letter.

16 THE COURT: Go ahead and tell me about
17 them.

18 MR. NESBITT: They were wrongly cited.
19 They do not stand for the proposition, and we fessed
20 up to that.

21 THE COURT: But how can a lawyer who has
22 practiced for how many years -- short time,
23 Mr. Webster, but he's five or six years now -- and
24 you cite so many wrong cases? How do you do that?
25 How do you go through that legal research and cite

1 that like that?

2 MR. NESBITT: We were relying on -- when
3 the brief came to us and had those in there -- and I
4 will acknowledge right here, I did not do a good job
5 of reading each and every case that was cited in it.
6 That was my responsibility, and I failed on that
7 responsibility.

8 I think probably the other lawyers who
9 were involved in this will say the same thing. But
10 that does not AI make. That means the case was
11 cited wrongly.

12 Now, the Court may be of the opinion that
13 it was cited wrongly because of AI. I don't believe
14 it was. It certainly wasn't by us. But what I can
15 say is it was wrongly cited because it doesn't stand
16 for the proposition, which means I didn't do my job
17 as a senior lawyer -- the Texas senior lawyer on the
18 case.

19 THE COURT: But it's not even close. See,
20 that's a problem. It's not even like I can see this
21 as a typical lawyer's mistake, you know, even an
22 egregious mistake. It's just such a pattern
23 throughout the brief. I just can't figure out what
24 else it would be. I mean, you have to spend more
25 time, as I said, filing a brief like this than

1 filing a good brief.

2 MR. NESBITT: And I don't disagree with
3 that.

4 THE COURT: So what happened? How many
5 years have you been practicing?

6 MR. NESBITT: Thirty-four years.

7 THE COURT: How could you do that? How
8 could you possibly do that?

9 MR. NESBITT: Not read the case.

10 THE COURT: Yeah.

11 MR. NESBITT: Pressed for time. I was new
12 to the case. I relied on others. It was all bad
13 lawyering.

14 THE COURT: But you said you worked on the
15 brief.

16 MR. NESBITT: I did.

17 THE COURT: So how did you work on the
18 brief?

19 MR. NESBITT: I was focused on -- I had
20 interviewed witnesses, and I was focused on the
21 factual side of the brief and not focused so much on
22 the law side of the brief. It's no excuse, but you
23 asked me why.

24 THE COURT: What about Mr. Webster?

25 MR. NESBITT: I believe he did mostly the

1 same thing that I did and ensuring compliance with
2 local practice. Mr. Webster can certainly address
3 that.

4 But our -- but at the time -- how it came
5 about was, the brief was provided to us, we started
6 revising and exchanging. We asked for additional
7 research. We worked with counsel for New York on
8 areas we needed to beef up the brief on the
9 research. But at the end of the day, the bad cases
10 made it into it.

11 THE COURT: Like *Bradshaw v. Unity Marine*,
12 how did that even make it into the brief? It was
13 the one about class actions.

14 MR. NESBITT: Yes, ma'am. I can't answer
15 that question. I didn't put it in the brief, and I
16 didn't catch that. It shouldn't have been there.

17 THE COURT: The wrong legal reporter, the
18 wrong district court and the wrong year, not only
19 that.

20 MR. NESBITT: I acknowledge all of those
21 things, as we did in our letter and as we did in our
22 response to the order to show cause. It should not
23 have been in the brief. It was miscited, and we
24 asked for permission to correct that brief.

25 And, quite frankly, had counsel -- now,

1 they say today they didn't move for sanctions, but,
2 in fact, they did move for sanctions in the reply,
3 and they didn't follow the rule.

4 If they called us and said, Hey, Earl, is
5 this AI?

6 I don't know. It shouldn't be, I'll look
7 into it. I would have got back to them.

8 Hey, Earl, these cites don't say what they
9 do. We would have complied.

10 Now, is that their legal obligation? No,
11 it's not their legal obligation in filing a reply.
12 It is their legal obligation under the *Horton* case
13 and Rule 11 --

14 THE COURT: Rule 11, but there's
15 Section 1927 of Title 28. There's the Court's
16 inherent authority. There's all sorts of stuff that
17 this brief would attach to.

18 MR. NESBITT: This Court has the authority
19 to penalize us, for sure. Not our client, if it's
20 under 11(b)(2) or whatever, but certainly the
21 lawyers. And we understand and accept that. But I
22 would simply say, if you are going to punish us,
23 punish us for the right reasons, which is sloppy
24 lawyering, bad lawyering, but not AI.

25 THE COURT: Well --

1 MR. NESBITT: I would like for -- if the
2 Court would indulge, I would like for Mr. Zareh to
3 have the opportunity to address the Court.

4 THE COURT: Yes, go ahead, please,
5 Mr. Zareh.

6 MR. NESBITT: And if you have any
7 questions for any of the lawyers --

8 THE COURT: I want to talk to Mr. Pennetti
9 in a minute.

10 Go ahead.

11 MR. ZAREH: Good morning, Judge Boyle.

12 THE COURT: Good morning. Please, please,
13 be honest with me. It's okay if you did AI this
14 time. We'll put it aside as a mistake, but I can't
15 believe this brief is not AI.

16 MR. ZAREH: And I appreciate that, Judge,
17 and I want to address that directly.

18 First of all, good morning, Judge. Thank
19 you for letting me into your courtroom.

20 THE COURT: Sure.

21 MR. ZAREH: I wish it was under better
22 circumstances, number one.

23 Number two, I am not -- I'm in this
24 wonderful position where I can confess to Your Honor
25 and come clean. My name is on the firm. I had a

1 junior associate who was going through some personal
2 crises that he didn't talk to us about.

3 THE COURT: Mr. Pennetti?

4 MR. ZAREH: No, ma'am. Mr. Pham is here.
5 He's got the flu, which is why he has the mask on.

6 THE COURT: I know, but I'm going to have
7 him talk.

8 MR. ZAREH: And Your Honor, please do.
9 But the fact of the matter is --

10 THE COURT: Who was the junior associate
11 that wasn't him that worked on the brief?

12 MR. ZAREH: Mr. Pham worked on the brief
13 with me.

14 THE COURT: Was it --

15 MR. ZAREH: Mr. Fant, Mr. John Fant.

16 THE COURT: And Mr. Fant is here.

17 MR. NESBITT: Mr. Fant is here. He didn't
18 work on the brief, but he talked to several
19 witnesses.

20 THE COURT: Who was the young associate
21 that you said --

22 MR. ZAREH: It was Mr. Pham, William Pham.

23 THE COURT: So he primarily worked on the
24 brief?

25 MR. ZAREH: William and I worked on this

1 brief together. The first brief that William wrote,
2 which I reviewed extensively, was an opposition to a
3 motion for summary judgment.

4 THE COURT: What about Mr. Pennetti?

5 MR. ZAREH: Mr. Pennetti is not at my
6 firm. I don't think Mr. Pennetti worked on the
7 brief at all.

8 MR. NESBITT: Your Honor, Mr. Pennetti was
9 formerly on the pleadings when he was at the Rogge
10 Dunn Group. He left in May when the -- the day the
11 motion to dismiss was filed. He did not have any
12 involvement or -- any involvement whatsoever in the
13 response.

14 THE COURT: Okay. That's fine. That's
15 all I need to hear.

16 MR. NESBITT: I'm sorry.

17 THE COURT: And Mr. Pennetti, come up real
18 quick.

19 Mr. Pennetti, did you do anything to the
20 brief at all?

21 MR. PENNETTI: No, Judge.

22 THE COURT: Okay. Thank you. Go ahead
23 and sit down.

24 Okay. So Mr. Pham.

25 MR. ZAREH: We will refer to him as

1 William.

2 THE COURT: Okay. No, let's refer to him
3 by his last name.

4 MR. ZAREH: Mr. Pham.

5 THE COURT: How do you spell it?

6 MR. ZAREH: Pham, P-H-A-M.

7 THE COURT: Okay. Okay.

8 MR. ZAREH: Mr. Pham and I worked on the
9 brief together.

10 THE COURT: Who worked on it the most?
11 Always somebody works on it the most.

12 MR. ZAREH: Mr. Pham worked on it the
13 most. I am the senior lawyer. I reviewed it. I
14 gave him my first set of comments, which was to
15 rewrite the brief, which he did. He rewrote the
16 brief. I looked at it a second time. We had some
17 comments on some of the propositions. I read a few
18 of the cases that I thought were controversial
19 propositions, and I thought they were fine. And we
20 sent our part of the brief to Texas.

21 What I remember, Texas had their part of
22 the brief, and they were merged. And at some point,
23 Texas deferred to New York and said, We're not going
24 to read the cases, we assume the New York guys got
25 the cases right.

1 THE COURT: So Texas told you they didn't
2 read the cases?

3 MR. ZAREH: After the fact, after we got
4 the --

5 THE COURT: Show cause order.

6 MR. ZAREH: No, no, Your Honor. When we
7 got their reply that accused us of using artificial
8 intelligence, my first response was to call William
9 and say -- Mr. Pham -- Did you use AI?

10 His response was, Hell, no. It may be
11 wrong, but we certainly did not use AI.

12 And if you want -- and forgive me, Judge,
13 I'm also new to this. But my teenage daughter tells
14 me that her teacher can run things through an AI
15 tester to see how much of something is AI. So if
16 this was really an issue, if they really thought
17 that we were using artificial intelligence, they
18 could have called us and asked us that. They could
19 have shown Your Honor some kind of test to show
20 that.

21 And, Judge, you don't know me. I've never
22 been before Your Honor.

23 THE COURT: I know. I'm sure you're a
24 straightlaced guy.

25 MR. ZAREH: When Your Honor starts off the

1 hearing with, "I find it hard to believe that this
2 was AI --"

3 THE COURT: Yeah.

4 MR. ZAREH: -- let me assure Your Honor,
5 we don't need artificial intelligence to be this
6 bad. This was human misintelligence to be
7 completely wrong, and it will not happen again.

8 THE COURT: I know it won't happen again.
9 But like I said to him, Mr. Nesbitt, you have to
10 work really hard to get a brief this bad. And I
11 don't think you can do it just by messing up and
12 making mistakes, negligence. I think it has to be
13 some --

14 MR. ZAREH: But --

15 THE COURT: Nope -- some organized way of
16 misrepresenting everything.

17 MR. ZAREH: Your Honor, if this was an
18 organized misrepresentation, we would not have been
19 so surprised when we got their reply.

20 THE COURT: Well, maybe Mister --

21 MR. ZAREH: If I can -- forgive me.

22 If I can just address the perfect storm,
23 that was this brief. And I'm not offering this as
24 an excuse at all. Mr. Pham had some remarkable
25 personal crises he was going through. That led him

1 to do some errors on our brief.

2 The attorney at the Rogge Dunn Group who
3 was previously on the case had gone off the case.
4 So Mr. Nesbitt had been on the --

5 THE COURT: That's Mr. Pennetti.

6 MR. PINNETTI: Yes, Your Honor.

7 MR. ZAREH: I think Mr. Nesbitt had been
8 on for half an hour on the case, although it's been
9 a pleasure working with him.

10 Look, these cases, the vast majority of
11 them came from our firm, it came from my watch. And
12 whatever William was going through at the time, it
13 rests with me.

14 I did not use artificial intelligence.
15 Nobody at my firm uses artificial intelligence.
16 And, quite frankly, when an attorney has a personal
17 crises and they just do a bad job as an attorney,
18 one of the things I would ask Your Honor to do is to
19 allow us to attend to the crisis and refile.

20 THE COURT: Yeah, yeah, I may do that, but
21 is there anything else that you have?

22 MR. ZAREH: Yes, Your Honor. There's two
23 other things.

24 To the extent that there are specific
25 cases that made it that shouldn't have made it --

1 THE COURT: Like *Johnson v. Pride* has
2 nothing to do with the class action, found its way
3 into your response for the proposition that it
4 upheld a class action claim.

5 MR. ZAREH: Your Honor, so I asked that
6 question specifically. How did this happen? Your
7 Honor, I've got one better for you. When you have
8 things in quotation marks, those should be in the
9 citation, right? Our original brief didn't do that.

10 THE COURT: I know. I mean, I know that.
11 I've seen all of the mistakes.

12 MR. ZAREH: Your Honor, forgive me, if I
13 can just share with the Court. I appreciate the
14 fact that Your Honor wants us here to explain why
15 this happened, how it happened, and I am trying to
16 tell you as best I can.

17 Every time we needed a citation for
18 something, I asked William to look it up, and he
19 made an error and I didn't proof it. It's on my
20 watch, and I take full responsibility.

21 THE COURT: I appreciate that very much.
22 But Mr. Pham has to -- is it Mr. Pham?

23 MR. ZAREH: Yes, Your Honor.

24 THE COURT: -- Mr. Pham has to speak for
25 himself.

1 MR. ZAREH: Of course he does, and of
2 course he will. I'm happy to do that, Your Honor.

3 The one thing I would ask -- and we do
4 this all the time when an attorney is going through
5 a personal crises -- is please put it in context.

6 THE COURT: What do you mean? Oh, put it
7 in context with his crisis, yes.

8 MR. ZAREH: Okay.

9 THE COURT: Thank you.

10 MR. ZAREH: Unless Your Honor has anything
11 more -- and really, Your Honor, I am here to look
12 this Court in the eyes and explain anything and
13 everything to Your Honor.

14 THE COURT: I know you are.

15 MR. ZAREH: Okay. Thank you, Your Honor.

16 THE COURT: All right, Mr. Pham, come on
17 up here.

18 MR. ZAREH: And Your Honor, Mr. Pham is
19 dealing with an illness.

20 THE COURT: Mr. Pham, will you take your
21 mask off, please?

22 All right. Now, I'm going to tell you, no
23 matter how badly you're feeling, and you're looking
24 like you feel pretty bad, and I don't know if that's
25 because of this or your sickness.

1 Mr. Pham, I just want you to fess up if
2 this was AI -- and I think it was -- come on, stop
3 that. Come on, stop that.

4 Now, I think this was an AI brief
5 partially. And you can tell me it wasn't, but I'm
6 not going to believe you. But go ahead, tell me
7 what it was.

8 MR. PHAM: No, Your Honor. Like Mr. Zareh
9 had mentioned, I was going through a lot of
10 personal --

11 THE COURT: Speak up.

12 MR. PHAM: I was going through a lot of
13 personal issues at the time. And the way that I
14 organized the brief, it was left subject to a lot of
15 error if I were to make edits to it, which is what
16 happened.

17 THE COURT: You know, edits to it. It's
18 not even -- but it's cases that don't even stand for
19 the proposition that you've cited them for. Where
20 did you pull up *Johnson v. Pride Industries*?

21 MR. PHAM: So, Your Honor, how --
22 unfortunately, how I organized the brief writing, I
23 pulled many more cases that -- many more cases that
24 ultimately --

25 THE COURT: Speak up. Speak up. You

1 know, I'm sure you're sick, but you don't -- it
2 seems like you're more sick because of this
3 situation. So speak up, please.

4 MR. PHAM: So the cases that I pulled for
5 the response, there were a lot more cases.

6 THE COURT: The cases you pulled were
7 what?

8 MR. PHAM: There were a lot more cases I
9 found that ultimately were whittled down. I think
10 there were 40, in the neighborhood of 40 cases that
11 were in the response. I had originally pulled close
12 to about 80 to 90, I believe.

13 And the way that I organized what I needed
14 to put into the brief and what I wanted certain
15 cases to say, by putting in -- by making edits to
16 that grid, it shifted down a lot and led to a lot of
17 mis-organization, and I apologize for it.

18 THE COURT: I mean, did you even proofread
19 it?

20 MR. PHAM: I did. And unfortunately, you
21 know, my personal issues kind of got in the way --

22 THE COURT: Yeah, I mean --

23 MR. PHAM: -- of being more accurate.

24 THE COURT: I just can't believe this
25 isn't an AI brief, I can't.

1 Anything else?

2 MR. PHAM: No, Your Honor.

3 THE COURT: All right. Sit down.

4 What do you want me to ask him? Do you
5 want me to ask him something else? Because he says
6 it's not an AI brief, and that's all I need to hear
7 from him.

8 MR. ZAREH: Your Honor --

9 THE COURT: Come on up. Come on up.

10 MR. ZAREH: -- I think what Mr. Pham was
11 trying to tell the Court is he organized 80 or 90
12 cases in a grid on a spreadsheet. When he realized
13 some of the cases weren't appropriate, he deleted
14 some of those and it got misaligned.

15 Judge, I appreciate the fact that Your
16 Honor thinks this is an AI brief, and there's
17 nothing we can say.

18 THE COURT: There's something you can say,
19 but you haven't said it yet.

20 MR. ZAREH: Judge, what else can I tell
21 you?

22 THE COURT: I mean. . .

23 MR. ZAREH: I didn't use it. My associate
24 didn't use it. Our firm didn't use it. The Rogge
25 Dunn Group has told you they didn't use it. We have

1 sworn to it before, Your Honor. If Your Honor wants
2 to take on some kind of technology to review the
3 brief to see what score it gets --

4 THE COURT: Wait a minute. I did, on
5 ChatGPT, an AI search engine, and I found this
6 *Johnson v. Pride Industries* cited in the same
7 erroneous manner in which your response cited it.

8 MR. ZAREH: That's hardly a scientific
9 analysis of the brief --

10 THE COURT: No, no --

11 MR. ZAREH: -- respectfully. And if I
12 may, if my 13-year-old can be cited by her English
13 teacher for using AI and go do it over again,
14 because I ran it through some kind of a search
15 filter to see if you used AI, then, respectfully, we
16 can do that here.

17 THE COURT: I said, my clerk found it in
18 ChatGPT, an AI search engine that describes *Johnson*
19 *v. Pride Industries* in the same erroneous manner
20 that the response does.

21 MR. ZAREH: Your Honor, respectfully.

22 THE COURT: No, no. Are you listening to
23 me?

24 MR. ZAREH: I am.

25 THE COURT: Okay.

1 MR. ZAREH: May I respond?

2 THE COURT: Yes.

3 MR. ZAREH: I teach CLEs for Ethics --

4 THE COURT: I don't want to hear about
5 that.

6 MR. ZAREH: -- and one of the things that
7 we constantly tell lawyers is that the trouble with
8 AI is it takes some amount of truth and puts some
9 amount of fabrication. And just because Your Honor
10 found a similar citation, one, or your clerk, using
11 ChatGPT for this specific case hardly proves that we
12 did artificial intelligence.

13 THE COURT: I just think that your arm's
14 length dealing with Mr. Pham -- and I think it was,
15 because it wasn't right on him or you would have
16 caught these things -- is it's just you're trying to
17 go down with the ship, as a captain would, and I
18 understand that. But I just want to hear that
19 somebody around here thinks this is an AI brief
20 besides the defense.

21 MR. ZAREH: I do not. I have sworn
22 against that.

23 THE COURT: Okay.

24 MR. ZAREH: I will go down with the ship.
25 Bring me a stack of Bibles, I will swear to it. We

1 did not use artificial intelligence.

2 THE COURT: Okay.

3 MR. ZAREH: And, Your Honor, if you think
4 we did, there's a very easy way to prove it. We can
5 run the brief through an algorithm and report back
6 to Your Honor how much of it is.

7 THE COURT: No, that's all right.

8 Anything else from the defense -- from the
9 plaintiffs?

10 How about the defense, Ms. DeSantos,
11 anything else?

12 MS. DE SANTOS: I think really, just to
13 put a bit of a fine point on that pencil, Your
14 Honor, Mr. Zareh said that he worked with Mr. Pham
15 on preparing this response to the motion to dismiss;
16 that he read the cases, reviewed/edited the brief,
17 gave comments on the draft.

18 I lost -- I -- just quickly, one, two,
19 three, four, five, six, at least six cases, there's
20 more --

21 THE COURT: There are at least ten.

22 MS. DE SANTOS: At least. But some of the
23 ones that are much more egregious in misrepresenting
24 to the Court what the legal holdings of those cases
25 are, are significant.

1 I could not agree more with the Court --
2 and we argue this in our response to their OSC
3 response -- this kind of mistake doesn't happen
4 repeatedly over and over.

5 And one additional note -- and I think
6 it's really clear and really important -- the errors
7 that were made, the really substantive errors that
8 were made in the representation to the Court of what
9 those cases held coincidentally go directly to rebut
10 a specific legal issue that we raised in our motion
11 to dismiss.

12 THE COURT: Um-hum. Um-hum.

13 MS. DE SANTOS: Standing. Oh, there's two
14 cases that specifically --

15 THE COURT: That don't stand for standing.

16 MS. DE SANTOS: -- that don't stand for
17 that standing proposition in a class certification
18 case.

19 The hostile work environment argument.
20 The totality of the circumstances absent some other
21 specific evidence to rise to this severe pervasive
22 level can support a hostile work environment claim.
23 Two cases that they cite for that, *Brown* and *Keeling*
24 don't say that. In fact, they have the exact
25 reverse holding.

1 Those two issues make it very hard for me
2 to question that this is not an AI brief; that the
3 error occurred over and over and over again, and
4 that it coincidentally also addresses a specific
5 substantive legal issue --

6 THE COURT: Yeah, the issue.

7 MS. DE SANTOS: -- that rebuts or purports
8 to rebut one of the issues that we raised.

9 So that's really the only other item I
10 wanted to point out to the Court.

11 THE COURT: Okay. Thank you.

12 You know, this is the beginning of this,
13 this AI stuff, and I think it's very interesting. I
14 can't believe people are using it. But Mr. Zarah, I
15 don't think you probably used it, I don't think you
16 did, but I think Mr. Pham did. He's over there
17 acting all sick, and I don't think he's really that
18 sick.

19 But, you know, you need to address -- can
20 you look at me, please, sir? You. Mr. Zareh.
21 Mr. Zareh, you need to look at me.

22 I think you need to address his problems
23 in-house and deal with that, whatever it was, but I
24 think we have an AI brief here. And I don't think
25 that you knew about it. I agree that you didn't

1 probably know about it. And I can't believe the
2 Dallas lawyers did not look at this brief any more
3 closely than they did. But I think it's an AI
4 brief, and I think Mr. Pham knows, and that's why
5 he's sick today.

6 So I think what I'm going to do is this.
7 I am going to grant the motion to dismiss, not on
8 the AI brief, not on the AI stuff, but on the
9 allegations and the response the way it was. They
10 don't -- you know, it's impossible to -- I mean, I'm
11 going to grant the motion to dismiss, but I'm going
12 to give you another chance to re-brief it. Okay?

13 So you can file -- we're going to grant
14 the motion to dismiss on the pleadings, themselves,
15 not on the AI portion of it. But I do think the AI
16 portion is appropriately addressed, and I am going
17 to do a public reprimand, because I find it's bad
18 faith.

19 And I'm sorry, Mr. Zareh, because I don't
20 know how much you were involved with this, Mr. Pham
21 knows and it was bad faith to file this brief and
22 then to come back and defend it. And I think for
23 that, I'm going to do a public reprimand. That's
24 all I'm going to do, and then I will move on with
25 this case.

1 I probably wouldn't have done a public
2 reprimand if you-all -- well, I wouldn't have done
3 one if you-all had just agreed that this is an AI
4 brief, but maybe you don't know. Maybe you don't
5 know. Maybe you do know, I don't know.

6 So that's what I'm going to do. And we
7 will get a scheduling order out -- a scheduling for
8 the briefing out soon.

9 Is there anything else, Mr. Zareh,
10 Mr. Nesbitt?

11 MR. NESBITT: Just one point of
12 clarification on your ruling, Your Honor.

13 Did I understand that the Court is going
14 to grant the motion to dismiss but give us a chance
15 to replead the complaint? Or do you want to us
16 respond --

17 THE COURT: No, no, I want you to respond
18 to the motion to dismiss, yeah.

19 MR. NESBITT: Okay.

20 THE COURT: Yes, the motion to dismiss,
21 yes.

22 MR. NESBITT: Appropriately.

23 THE COURT: All right. We will see what
24 happens, and I trust this won't happen again.

25 MR. ZAREH: No, Your Honor.

1 THE COURT: I know.

2 All right. Anything else?

3 MS. DE SANTOS: So just to make sure I
4 understood that, the motion to dismiss is granted.

5 THE COURT: Yes. It's granted without
6 prejudice for them to, you know, file it -- file
7 another one -- I mean, yeah, start again. So you
8 would file the motion to dismiss. Right? No, you
9 would file a response to motion to dismiss.

10 MR. ZAREH: We're filing another response
11 to --

12 THE COURT: I gotcha. I gotcha.

13 MR. NESBITT: And the Court is going to
14 tell us when that's due?

15 THE COURT: Yes, I will, in the next
16 couple of days, I'll draft it in an order.

17 MR. NESBITT: Just one personal request,
18 Mr. Webster and myself are leaving the country
19 tonight, and we're not back for ten days.

20 THE COURT: That's okay. I will give you
21 30 days, 40 days, something like that -- plenty of
22 time.

23 MR. NESBITT: Thank you. I appreciate it.

24 MS. DE SANTOS: Is the response that
25 they're going to file going to be essentially a

1 request for a rehearing or --

2 THE COURT: No, it's going to be a
3 response to your motion to dismiss. That's all it
4 is, and you can file a reply.

5 MS. DE SANTOS: On a motion that's already
6 been granted.

7 THE COURT: Okay. That's right. Yeah.
8 So we've got the motion to dismiss resolved, and now
9 we need another motion to dismiss. So how are we
10 going to do this?

11 MS. DE SANTOS: The motion to dismiss
12 addressed the class issues, which we argue cannot be
13 sustained.

14 THE COURT: I'm going to let them do that
15 again.

16 MS. DE SANTOS: So why don't -- if the
17 Court is going to grant the motion to dismiss,
18 perhaps, then, what the plaintiffs ought to do is
19 file a motion to reconsider and argue the basis of
20 that and whatever legal -- legitimate legal
21 citations support a motion to reconsider the Court's
22 order on the motion to dismiss.

23 THE COURT: Or you could just amend the
24 complaint and somehow -- I think we start over
25 again. You amend the complaint and take anything

1 out of the there that doesn't belong there, but I
2 don't know that there is anything. And then you
3 file a motion to dismiss, second motions to dismiss.

4 All right?

5 MR. NESBITT: That's what Mr. Webster had
6 suggested, and we will offer to do that.

7 MS. DE SANTOS: On a third amended.

8 THE COURT: Yes. Well, I don't know what
9 it is right now, second amended, third amended,
10 whatever it is. That's the way we will do it. All
11 right?

12 And I appreciate so much that you-all did
13 all this work on that. I think you're absolutely
14 bulls eye right about this AI brief. And I hope --
15 I don't think we will see it again. We will see if
16 we do. All right? But in the meantime, you haven't
17 asked for sanctions. I gave you a sanction anyway.
18 That's all. Okay?

19 Anything else?

20 MR. NESBITT: Our apologies to the Court
21 and Counsel.

22 THE COURT: We will be in recess.

23 (Court in recess at 11:12 a.m.)
24
25

C E R T I F I C A T E

I, Shawnie Archuleta, CCR/CRR, certify
that the foregoing is a transcript from the record
of the proceedings in the foregoing entitled matter.

I further certify that the transcript fees
format comply with those prescribed by the Court and
the Judicial Conference of the United States.

This 20th day of November 2024.

s/Shawnie Archuleta
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The Northern District of Texas
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